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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 414

CHATTANOOGA BAKERY, INC., PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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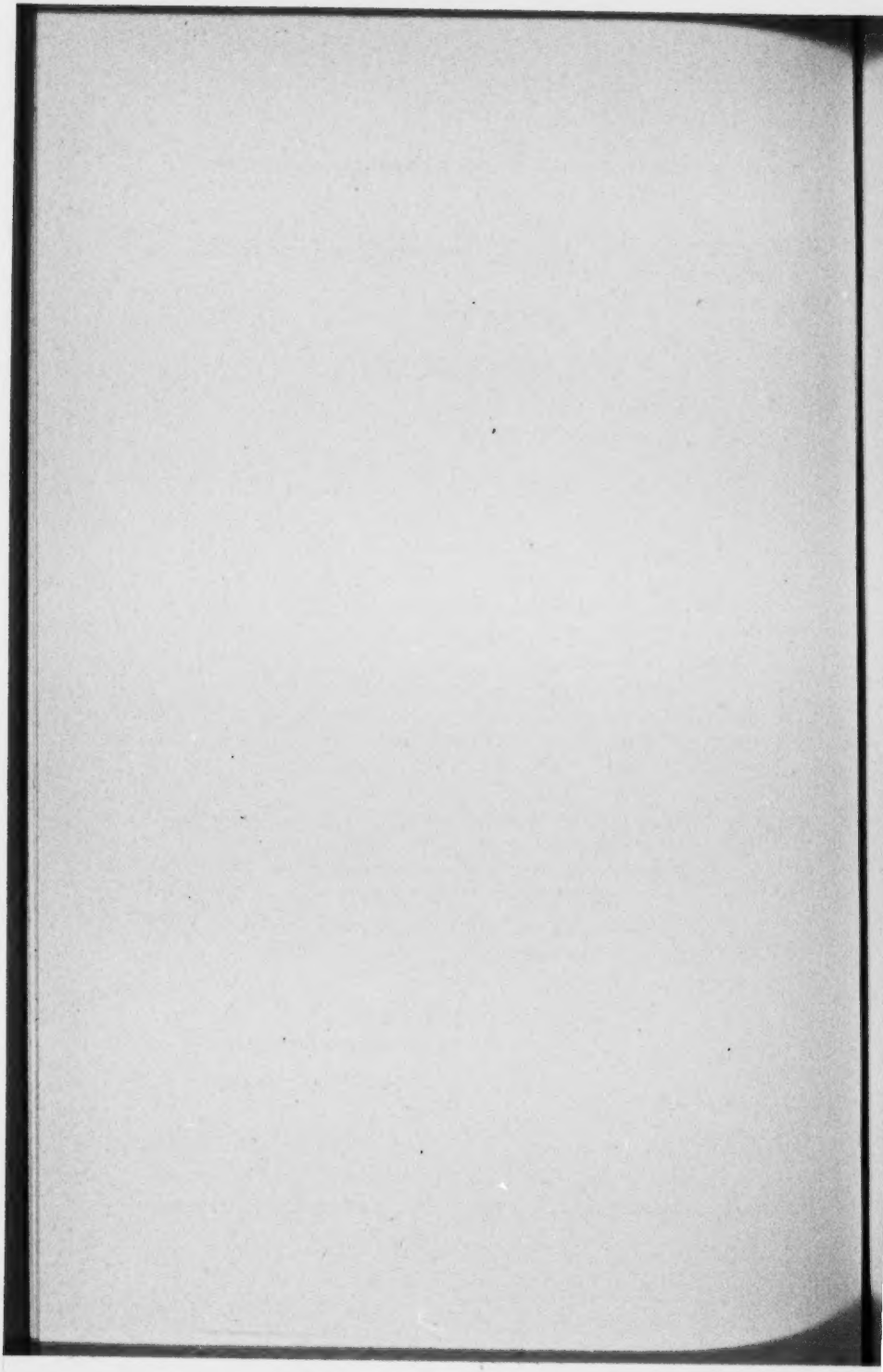

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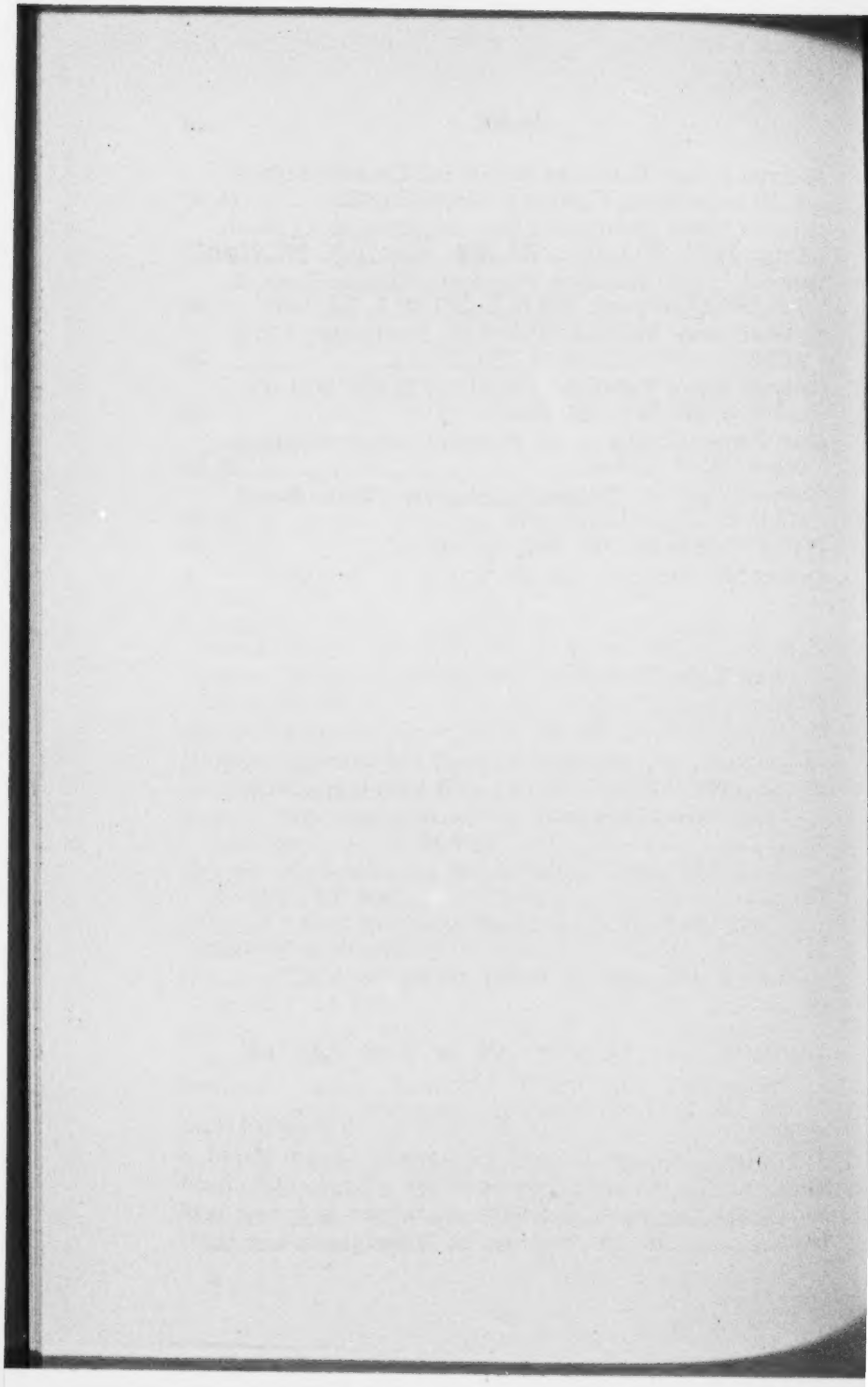

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MAY IT PLEASE THE COURT:

The petitioner, Chattanooga Bakery, Inc., a corporation, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner Chattanooga Bakery, Inc., is a corporation organized under the laws of Tennessee. It purchased a bakery in Chattanooga, Tennessee, on July 1, 1939, from Mountain City Mill Company. Petitioner is a new corporation which had never previously engaged in any busi-

ness. During prior ownership and more than a year before petitioner's purchase, the Mill Company had experienced labor difficulties resulting in a strike which was settled by an open shop union agreement which expressly recognized the fact that the bakery was in liquidation and provided that in the event of the sale of the bakery property the union contract should terminate (R. 950; Board's Exhibit No. 4).

It is conceded that the sale of the property was not caused by a desire to eliminate the union but was dictated by business conditions due to continuous losses in the operation of the bakery (R. 33).

At the time of petitioner's purchase there were 107 nonsupervisory employees working in the bakery. Approximately fifty-five or fifty-six were members of the union whose contract expired upon the sale. In selecting its new force for the operation of the bakery the petitioner employed twenty-nine individuals who were active members of the union, including its President and Secretary and two of the three members of the union grievance committee, but failed to employ twenty-six who were members of the union (R. 33, 393, 303).

Because of petitioner's failure to hire all of the employees of the former owner who were union members, a strike was called and fifteen union members who were hired by petitioner voluntarily quit their jobs.

In a proceeding instituted before the National Labor Relations Board the Board found that the Mill Company, *the previous owner,* had been guilty of unfair labor practices in connection with the strike which occurred in the bakery during the previous ownership, and more than a year prior to petitioner's organization and purchase of the bakery. The Board's finding with respect to these matters was limited to the previous owner and had no application to the petitioner, Chattanooga Bakery, Inc. (R. 29).

The Board further found, however, that petitioner had discriminated against those individuals who were not

employed but admitted that the evidence showed that the affirmative reasons advanced by petitioner for declining such employment had "some foundation in fact in several cases" (R. 70). However it reached the conclusion that such rejection was based in part upon union activities and union membership. The evidence relied on by the Board in support of this finding of discrimination consisted of unsubstantial minor events occurring after July 1, 1939, and *after* petitioner's purchase of the bakery (R. 33-35, 66). Upon this finding the Board, among other things, ordered reinstatement with back pay of all of those applicants who were not hired by the petitioner and those who were hired and who left their employment because of the failure of petitioner to hire the others.

The Board filed this enforcement proceeding in the United States Circuit Court of Appeals for the Sixth Circuit and enforcement was resisted upon the ground, among others, that the Board's conclusions were based upon no substantial evidence and were in reality mere surmise, conjecture and suspicion.

The United States Circuit Court of Appeals for the Sixth Circuit by a divided court directed enforcement of the Board's order, predicating its conclusions upon a finding of substantial evidence to support the Board's order based upon events and occurrences which occurred during prior ownership and more than a year before the purchase of the bakery by petitioner.

National Labor Relations Board v. *Chattanooga Bakery, Inc.*, 127 F. 2d 201.

The evidence set out in the majority opinion of the United States Circuit Court of Appeals for the Sixth Circuit as a basis for support of the Board's finding against petitioner may be briefly summarized as follows:

(a) In 1933, more than a year prior to petitioner's purchase of the properties, Richard Bean, Vice President of Mountain City Mill Company (who was never employed by petitioner), manifested hostility to the union, which

afterwards made a contract with the Mountain City Mill Company, and either Hutcheson or Bean (neither of whom was ever employed by petitioner) had threatened to shut the bakery down and sell it out if the union didn't leave them alone. The Board found as a fact, however, that:

> "While the anti-union statements of the Mill Company officers and agents, heretofore discussed, reflect the respondent's dis-satisfaction with and hostility toward the Union, the Mill Company's substantial losses over a period of years, its efforts to effect a sale of the business antedating the advent of the Union, and the ultimate passage of control of the business to new interests persuade us that the sale and liquidation was not caused by a desire to eliminate the Union but was dictated by business considerations. We are of the opinion that the proof sustains the Mill Company's position and so find. Accordingly, we will dismiss those allegations of the amended complaint."
> (R. 33).

(b) Superintendent Shauf, during his *previous* employment with Mountain City Mill Company, stated in substance that as soon as the union contract terminated Mountain City Mill Company would try to work up something for its own benefit, and also stated to an employee of the Mountain City Mill Company that the Mill Company was going to get the union out of the shop one way or another. Shauf was not an employee of the petitioner at the time these statements were made. The incidents took place more than a year prior to the purchase of the property by petitioner. His statements expressly related to the Mountain City Mill Company. The Board found as a fact that Mountain City Mill Company made no effort to do any of these things and *absolved* the Mountain City Mill Company from the amended charge and dismissed the complaint with respect to it (R. 33, 89, 92).

Nevertheless, the United States Circuit Court of Appeals by the majority opinion regarded these statements as substantial testimony sufficient to enforce the Board's

finding of discrimination against petitioner simply because it employed Shauf *more than a year later* and instructed him to make a selection of personnel on the basis of individual merit, ability, physical fitness, character and educational background.

(c) Forelady Vondrake, in 1938, while employed by Mountain City Mill Company, urged a striking employee of Mountain City Mill Company to leave the union and abandon the strike, and told another employee of Mountain City Mill Company—*more than a year before petitioner purchased the properties*—that she ought to get herself kicked for joining the union. Both the Board and the Court found as a fact that the applicants in question were rejected by a committee composed of Shauf, Parks and Johnson. Vondrake was not a member of the hiring committee and had nothing to do with the selection of the employees of petitioner and, of course, had nothing to do with any alleged discrimination in their selection.

The *only incident* found by either the Board or the majority opinion of the United States Circuit Court of Appeals to have occurred *after* petitioner had purchased the property and hired its supervisory force was a conversation between foreman Cleary and employee, Julia Mazerole, on July 7 or 8, 1939, to the effect that she would have to choose between attending the union meeting and working for the Bakery. It is conceded that Foreman Cleary had absolutely nothing to do with the selection of petitioner's employees or with the failure to hire the twenty-seven applicants who were rejected. He was desperately ill during the trial and died shortly thereafter. Moreover, this conversation occurred after the personnel committee *had employed* Julia Mazerole notwithstanding her union membership. It is undisputed that she was not discharged by petitioner after being so employed but by her own admission she continued to work for petitioner until she voluntarily quit (R. 735).

The remaining evidence referred to in the majority opinion of the court was the circumstance that Superintendent Shauf had possession of a list of all of the employees of the Mill Company who were members of the union. But Circuit Judge McAllister followed this statement with the frank admission that the proof further showed that the list in question had been furnished to Superintendent Shauf by the National Labor Relations Board itself in order to enable the Mill Company to comply with the terms of its union contract in filling vacancies.

In the proceeding before the National Labor Relations Board affirmative evidence was introduced disclosing the precise reason for petitioner's failure to hire the applicants in question. In practically every instance the applicant in question upon cross examination *admitted the truth* of this testimony. The United States Circuit Court of Appeals declined to consider this undisputed testimony although conceding that:

> "In certain instances these claims appear credible and persuasive."

This Court may test the soundness of this statement by referring to the testimony of Media Louise Bragg, one of the rejected applicants. It was claimed that Miss Bragg was not selected to work for the petitioner because she had a peculiar disposition and other employees found it hard to get along with her, which was illustrated by the fact that she had a sister who worked in the plant and to whom she had not spoken for years (R. 401, 532-535).

This applicant admitted in her testimony that she had had arguments with other employees during working hours in the plant (R. 665). She further admitted that she and her sister who worked in the plant were not on speaking terms and that when anyone tried to give her instructions she had had arguments (R. 666). She testified af-

firmatively that she had not spoken to her sister for years, saying:

> "I would have spoke to her if she spoke to me but unless she spoke to me I wouldn't speak to her."
>
> (R. 668.)

Notwithstanding this undisputed affirmative testimony petitioner has been ordered by the court to employ Media Louise Bragg with back pay upon the theory that the Board's finding of discrimination against her was supported by substantial evidence consisting of isolated events which occurred more than a year prior to the purchase of the bakery and in which neither the petitioner nor Media Louise Bragg participated.

Applicant Bragg's testimony is cited merely as an illustration. *The same situation exists with respect to every other applicant who was rejected.*

The record discloses that petitioner's entire capital consists of $25,000. Under the court's decree it has been ordered to pay penalties in the form of back wages to applicants who were never at any time employed by the petitioner aggregating many times petitioner's total assets. This, of course, means the immediate and complete dissolution of petitioner's business with consequent unemployment for approximately 150 people presently employed. Petitioner's assets are hardly sufficient to pay present creditors and lien holder. Its physical assets are covered by a mortgage exceeding the value of its properties. Petitioner is producing food in a highly specialized defense area occupied by United States troops. The consequent destruction of its business means the loss of this food production and the loss of revenue to the United States Government. Nothing will remain for stockholders and little, if anything, will be available for distribution among the rejected applicants and striking employees, practically all of whom have sought and obtained employment elsewhere.

All of this rests entirely upon the conclusion that animosities shown to exist between the previous corporate owner and its employees more than a year prior to the birth of petitioner corporation and its purchase of the bakery are imputable as a matter of law to this petitioner and constitute substantial evidence against this petitioner sufficient to justify from a legal standpoint its complete extinction.

REASONS RELIED UPON FOR THE ISSUANCE OF THE WRIT.

(1) The decision of the United States Circuit Court of Appeals for the Sixth Circuit in the instant case in holding that events occurring between the previous owner and its employees more than a year prior to the purchase of the bakery by petitioner reflecting union animosities constitute substantial evidence to support findings against this petitioner with respect to the failure to hire applicants never previously employed by the petitioner is a clear denial to the petitioner of the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States and is contrary to the principles announced by this Court in *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, and *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 392.

(2) The decision of the United States Circuit Court of Appeals for the Sixth Circuit in the instant case in imputing to a subsequent purchaser the legal effect of events occurring during the operation of the bakery by the prior owner with respect to employees subsequently hired by the purchaser, involves an important question of Federal law which has not been but should be settled by this Court.

(3) The decision of the United States Circuit Court of Appeals for the Sixth Circuit in the instant case is

manifestly erroneous since it is predicated upon evidence which no reasonable mind would accept as adequate to support its conclusions and such evidence therefore affords no substantial basis of fact from which the fact in issue could be reasonably inferred.

(4) In the decision in this cause the United States Circuit Court of Appeals for the Sixth Circuit so far departed from the accepted and usual course of judicial proceedings by predicating its finding of substantial evidence upon events occurring more than a year prior to the purchase of the bakery by petitioner and to which petitioner was not a party and attributed the legal effect of such events to the petitioner as to call for the exercise of this Court's power of supervision.

Your petitioner annexes hereto and presents herewith as a part of this petition a certified copy of the entire record in this cause in the United States Circuit Court of Appeals for the Sixth Circuit, specification of error, and brief and argument, giving in more amplified form the reasons why the decision and judgment of the Circuit Court of Appeals for the Sixth Circuit was erroneous and should be reversed, and respectfully asks that the certified copy of the record, specification of error, brief and argument be considered in connection with and as a part of this petition for the purpose of testing the correctness of the ruling of the Circuit Court of Appeals for the Sixth Circuit.

PRAYER FOR WRIT.

Wherefore your petitioner, Chattanooga Bakery, Inc., a corporation, respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day

certain to be therein named, a full and complete transcript of the record and all proceedings in the case cited on its docket as No. 8998, styled, *National Labor Relations Board, Petitioner,* v. *Chattanooga Bakery, Inc., and Mountain City Mill Company, Respondents,* and that said judgment of the said United States Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court, and that your petitioner may have all other and further relief in the premises as the Honorable Court may deem meet and just; and your petitioner will ever pray.

Chattanooga Bakery, Inc.,
By Cecil Sims,
Attorney for Petitioner.

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Of Counsel.